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No. 85-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD E. BROWN, *et al.*,
Petitioners,

v.

KERR-MCGEE CHEMICAL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED*

Whether the Atomic Energy Act, as amended, 42 U.S.C. § 2011 *et seq.*, preempts a request for a state-law injunction requiring the removal of "byproduct material," containing inseparable radioactive and nonradioactive components, from a site licensed by the Nuclear Regulatory Commission.

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* Kerr-McGee Chemical Corporation is a wholly-owned subsidiary of Kerr-McGee Corporation. The following are partially-owned subsidiaries or affiliates of Kerr-McGee Chemical Corporation: Brewster Phosphates; Basic Management, Inc.; Bikita Minerals (Private), Ltd.; Crescent Petroleum Company; Downtown Airpark, Inc.; Little Medicine Development Company; San-Ann Service, Inc.; Texoma Pipe Line Company; White Shoal Pipeline Corporation; Kerr-McGee Oil (U.K.), Ltd.; Marine Resources Insurance, Ltd.; Sunningdale Oils (Ireland), Ltd.; Sunningdale Oils (U.K.) Ltd.; Transocean Drilling Company, Ltd.; Transocean Drilling (Curacao) N.V.; Transocean Drilling Company (U.K.), Ltd.; Transshore Drilling (Curacao) N.V.; Transworld Drilling Company (Nigeria), Ltd.; Transworld Drilling (U.K.), Ltd.; and Transworld North Sea Drilling Services, Ltd.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 767 F.2d 1234. The opinion of the district court (App. A, *infra*, 1a-5a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1985. A petition for rehearing was denied on October 24, 1985 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on January 21, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021, are set forth at App. B, *infra*, 6a-9a.

STATEMENT

1. Respondent Kerr-McGee Chemical Corporation ("Kerr-McGee") owns real property in West Chicago, Illinois, on which Kerr-McGee and its predecessors processed monazite ores containing thorium, a naturally occurring radioactive element. Liquid and solid wastes from the processing operations were stored on the West Chicago site. Pet. App. A2.[1] Although Kerr-McGee discontinued all plant operations in 1973, the processing wastes remain at the site pursuant to a license from the Nuclear Regulatory Commission ("NRC"). *Id.*

The wastes at Kerr-McGee's West Chicago site emit low levels of radioactivity. The radioactive and nonradioactive components of the wastes are inseparable, so that it is impossible to dispose of the nonradioactive components without also disposing of the radioactive components. Because of their thorium content, the wastes constitute "byproduct material" within the meaning of the Atomic Energy Act, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 ("UMTRCA"), 42 U.S.C. § 2014(e)(2).[2] Under the Act, the NRC is vested with broad

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[1] The Kerr-McGee site consists of an eight-acre factory site and a 27-acre storage and disposal site, connected by an eight-acre intermediate site (Pet. App. A2). In 1967, as part of a merger, Kerr-McGee acquired the facility, which had been in operation since the 1930's.

[2] Section 2014(e)(2) defines "byproduct material" as including "the tailings or wastes produced by the extraction or concentration of . . . thorium from any ore processed primarily for its source material content." The NRC staff has estimated that "at least 60% of the monazite ore was processed primarily for its source material

regulatory authority over the possession, transfer and disposal of byproduct material. *See* 42 U.S.C. § 2111.

In 1979, pursuant to an order issued by the NRC, Kerr-McGee submitted a plan for decommissioning the site. Kerr-McGee's plan proposed demolishing all buildings on the site, encapsulating the remaining waste materials in a protective cell, and landscaping the entire site. In May 1983, following public notice and comment, the NRC issued its Final Environmental Statement ("FES").[3] The FES considered Kerr-McGee's plan, as well as several alternatives, including a number of proposals that would require Kerr-McGee to remove all of the wastes from the site and dispose of them at other locations.[4] The NRC staff recommended on-site encapsulation, finding that it would entail no adverse environmental or health effects.[5] At the request of the State of Illinois, the Commission has authorized the Atomic Safety Licensing Board ("ASLB") to hold a hearing regarding Kerr-McGee's request for the license amendment. Pet. App. A2.[6] In that proceeding, the State is vigorously urging that the NRC deny Kerr-McGee's request and instead order that the wastes be moved elsewhere. App. A, *infra*, 4a.

2. Petitioners own parcels of residential property in West Chicago that are adjacent to the Kerr-McGee site.

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contents and the resulting tailings and wastes are clearly byproduct material." Resp. C.A. App. 272 ("Resp. C.A. App." refers to respondent's appendix in the court of appeals); *see* Pet. App. A13.

[3] Resp. C.A. App. 13-538.

[4] *Id.* at 25-26, 52-55.

[5] *Id.* at 167, 174, 175-177, 194.

[6] After the matter had been assigned to the ASLB for a hearing, both the NRC and the Environmental Protection Agency ("EPA") promulgated regulations pursuant to UMTRCA. The ASLB hearing has been postponed to enable the NRC staff to consider, among other points, whether its recommended proposal comports with the UMTRCA regulations and to supplement the FES accordingly.

In 1982, petitioners filed an action in state court asserting various claims against Kerr-McGee under state law. Petitioners' complaint sought actual damages, punitive damages, a permanent injunction requiring certain demolition and clean-up activities at the site and a mandatory injunction requiring removal of the processing wastes to some other location. The case was removed to the United States District Court for the Northern District of Illinois in light of the diversity among the parties.

Kerr-McGee moved to dismiss only that part of the complaint that requested a mandatory injunction requiring the removal of the wastes to a different location, contending that this claim for relief was preempted by federal law. The district court granted Kerr-McGee's motion. App. A, *infra*, 1a-5a. In so doing, the court pointed out that, by seeking an order requiring disposal of the wastes at some other location, petitioners admittedly sought to preclude implementation of the on-site encapsulation recommended by the NRC staff. *Id.* at 4a. Noting that there was no dispute that the wastes contain radioactive materials, the court concluded that "the injunctive relief sought by [petitioners would] interfere with the NRC's exclusive authority over the disposal of the radioactive wastes at the Kerr-McGee site." *Id.*

3. The court of appeals affirmed. Pet. App. A1-A25. It rejected the argument that the district court could find that the nonradiation hazards associated with the wastes justify their removal to another site pursuant to state law. Instead, it held that "when the radiation and nonradiation hazards are inseparable, federal law preempts a state-law injunction ordering removal of the wastes." *Id.* at A10-A11. The court reasoned that such an injunction "would, in effect, substitute the judgment of the district court for that of the NRC as to whether on-site encapsulation is the best method of storing this byproduct material." *Id.* at A14.

The court of appeals observed that petitioners could have intervened in the ASLB hearing to attempt "to convince the NRC that, for reasons related to either *radiation* or *nonradiation* hazards, the West Chicago site is unfit for storing the byproduct material." *Id.* at A15 (emphasis in original). The court noted that, absent intervention, petitioners could rely on other participants, including the State of Illinois, to represent their interests. *Id.*[7]

ARGUMENT

The court of appeals correctly held that petitioners' request for a state-law injunction requiring removal of the processing wastes from the West Chicago site is preempted by federal law. The decision below does not conflict with any decision of this Court or of any court of appeals and does not otherwise warrant review.

1. In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), the Court explained that

> where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

461 U.S. at 203-204 (citations omitted). Although we submit that, in fact, Congress has totally occupied the field of disposal of nuclear wastes, including byproduct

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[7] Judge Cudahy dissented. Pet. App. A17-A25. Although he disagreed with the majority's analysis of the preemption issue, he concluded that because the NRC has primary jurisdiction over the issue of disposal of the byproduct material, the district court should stay its proceedings pending the NRC's decision on that issue. *Id.* at A24-A25.

materials,[8] it is not necessary to consider the scope of preemption in order to conclude that the injunctive relief sought by petitioners is preempted by federal law.

As the court of appeals held, petitioners' request for injunctive relief is preempted because, if granted, an injunction ordering that the processing wastes be moved to a different location "would stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal regulation of radiation hazards." Pet. App. A15,

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[8] The Court in *Pacific Gas* observed that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." 461 U.S. at 212 (footnote omitted). Although Congress in 1959 enacted legislation permitting the states to enter into agreements with the NRC under which they may exercise limited regulatory authority over certain nuclear materials under limited conditions, *see* 42 U.S.C. § 2021(b), this provision is inapplicable here because, as the court of appeals pointed out, Illinois has not entered into such an agreement. Pet. App. A13 n.5. Even where a state has entered into such an agreement, the NRC retains the authority to regulate

> the disposal of such . . . byproduct, source, or special nuclear material as the Commission determines . . . should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

42 U.S.C. § 2021(c)(4).

The NRC's regulatory authority over the disposal of byproduct material was broadened by Congress' enactment in 1978 of UMTRCA, which expanded the definition of "byproduct material" to include the "tailings or wastes produced by the extraction or concentration of . . . thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2). UMTRCA also expanded the NRC's jurisdiction over such byproduct material to include a duty to "insure that the management of any byproduct material . . . is carried out in such a manner as . . . the Commission deems appropriate to protect the public health and safety and the environment from *radiological and non-radiological* hazards associated with the processing and with the possession and transfer of such material . . . ." 42 U.S.C. § 2114(a)(1) (emphasis added).

Thus, with respect to the narrow subject matter at issue here—the possession, transfer and disposal of byproduct material—Congress has granted the NRC exclusive and comprehensive authority to regulate all hazards, both radiological and nonradiological.

quoting Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The court of appeals' holding follows from the undisputed facts (1) that the radioactive and non-radioactive components of the byproduct material are " 'inextricably intermixed' "; (2) that the NRC "has exclusive authority to regulate the radiation hazards of the byproduct material"; and (3) that "Kerr-McGee must obtain a license from the NRC for decommissioning the West Chicago site and disposing of the wastes." *Id.* at A13 (footnote omitted).

In these circumstances, petitioners' assertion (Pet. 16-18) that there is no necessary conflict between the injunctive relief they seek and the regulatory authority of the NRC is incorrect. To begin with, the injunction sought by petitioners would require removal of the wastes from the West Chicago site, where Kerr-McGee is currently licensed to possess them. Removal to an unlicensed site would violate Kerr-McGee's license and federal law. Thus, an injunction would directly conflict with the existing NRC license.

Moreover, an injunction would undercut the federal statutory scheme granting the NRC broad discretion to regulate disposal of byproduct material on a nationwide basis. In particular, it would limit the ability of the Commission to choose the solution it deems appropriate. As the court of appeals concluded,

> an injunction ordering Kerr-McGee to remove the byproduct material from the West Chicago site would, in effect, substitute the judgment of the district court for that of the NRC as to whether on-site encapsulation is the best method of storing this byproduct material. True, the injunction sought by [petitioners] would not order the NRC to license a specific waste disposal site, but it would prevent the NRC from choosing the site recommended by the NRC staff. Furthermore, if federal law does not preempt [petitioners'] request for an injunction, nothing prevents neighbors of other prospective sites from

> relying on state law to obtain injunctions preventing NRC consideration of those locations. Such state law remedies, though not attempts to regulate the radiation hazards of byproduct material, nonetheless interfere with the NRC's ability to choose the method of disposal that, in light of radiation, nonradiation, and economic considerations, is the most appropriate.

Id. at A14.

In short, Congress' purpose in granting the NRC exclusive jurisdiction over the radiological hazards associated with the possession, transfer and disposal of nuclear wastes, including byproduct materials, would be frustrated if neighbors of any disposal site designated by the NRC could veto the NRC's decision by obtaining an injunction under state law. Congress entrusted the NRC with regulatory authority over these matters precisely to avoid this balkanization of decisionmaking. *See Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. at 212.

Petitioners argue (Pet. 17), however, that the "purpose" of their request for injunctive relief "is not to interfere with the NRC's jurisdiction, but to deprive Kerr-McGee of its choice of onsite encapsulation." But petitioners' motives in seeking the injunction are entirely irrelevant to the preemption analysis. Rather, the question is whether the state law remedy sought by petitioners would interfere with "the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 248. The fact remains that the injunction would have the effect of restricting the choices available to the NRC in exercising its broad regulatory authority over the possession, transfer and disposal of byproduct material.

In the same vein, petitioners speculate that the NRC might license the removal of the wastes to another location following entry of the injunction. Petitioners' claim that they can invoke state law to bar the NRC from con-

sidering on-site encapsulation as a disposal alternative stands preemption analysis on its head. As this Court stated in an analogous context in *Maryland* v. *Louisiana*, 451 U.S. 725, 751 (1981) (citations omitted):

> Even if the FERC ultimately determined that [certain processing costs] should be passed on *in toto*, this kind of decisionmaking is within the jurisdiction of the FERC; and the Louisiana statute [dictating the allocation of processing costs] . . . is inconsistent with the federal scheme and must give way. At the very least, there is an "imminent possibility of collision[.]" . . . The FERC need not adjust its ruling to accommodate the Louisiana statute. To the contrary, the State may not trespass on the authority of the federal agency.

The Court's preemption analysis in *Maryland* v. *Louisiana* is directly relevant here and confirms the correctness of the court of appeals' decision in this case.

2. Petitioners contend (Pet. 9-12) that the decision below conflicts with this Court's decisions in *Pacific Gas*, *supra*, and *Silkwood* v. *Kerr-McGee Corp.*, *supra*. This contention is without merit.

In *Pacific Gas*, a state statute imposed a moratorium on the certification of new nuclear plants pending a state finding that adequate means existed to dispose of high-level nuclear waste. After tracing the history of federal regulation of nuclear-powered electricity generation, the Court concluded that Congress intended the federal government to maintain "complete control of the safety and 'nuclear' aspects of energy generation," while permitting the states to continue exercising "their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." 461 U.S. at 212 (footnote omitted). The Court noted that the statute at issue "was aimed at economic problems, not radiation hazards," because the state legislature had determined that "[w]ithout a permanent means of disposal, the nuclear waste

problems could become critical leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors." *Id.* at 213-214. Accordingly, the Court held that the statute at issue was not preempted by federal law, since the economic concerns that it addressed were outside the field of nuclear safety occupied by the federal government. *Id.* at 216.

In reaching this result, the Court in *Pacific Gas* emphasized that the state had not sought "to impose its own standards on nuclear waste disposal," a field that the Court noted "is occupied by the Federal Government." *Id.* at 219. Here, in contrast, the injunction sought by petitioners would impose state standards on the disposal of byproduct material.

Petitioners' reliance on *Silkwood* v. *Kerr-McGee Corp., supra,* is similarly misplaced. *Silkwood* involved an award of damages pursuant to state law for injuries incurred from exposure to plutonium, a highly radioactive substance. The Court reviewed the legislative history of the Price-Anderson Act and concluded that it reflected Congress' intent that persons injured by nuclear accidents would have recourse to damages under state law. 464 U.S. at 251-256. In these narrow circumstances, involving only a damages remedy, the Court found no "irreconcilable conflict" with safety regulation and therefore no preemptive effect. *Id.* at 256. In this case, on the other hand, the mandatory injunctive relief sought by petitioners constitutes a direct and substantial encroachment on the NRC's authority to regulate the possession, transfer and disposal of byproduct materials. *See County of Suffolk* v. *Long Island Lighting Co.*, 728 F.2d 52, 58-60 (2d Cir. 1984); *Pennsylvania* v. *General Public Utilities Corp.*, 710 F.2d 117, 120 (3d Cir. 1983); *Bennett* v. *Mallinckrodt, Inc.*, 698 S.W.2d 854, 869 (Mo. Ct. App. 1985).

3. Petitioners also argue (Pet. 14-15) that the decision below is inconsistent with the court of appeals' previous decision in *Illinois* v. *Kerr-McGee Chemical Corp.*, 677

F.2d 571 (7th Cir.), *cert. denied*, 459 U.S. 1049 (1982). The claim is without merit.

In *Illinois*, the City of West Chicago sought relief from certain conditions at the Kerr-McGee site that were alleged to constitute a public nuisance. *See* 677 F.2d at 582. Unlike the complaint in this case, the City's complaint did not seek an injunction requiring the removal of any byproduct materials. In concluding that the City's state-law action was not preempted by federal law, the court of appeals pointedly observed that "[n]one of the alleged violations directly involved radiation hazards" and that "[n]othing in the record indicates that the measures necessary to remedy the alleged violations would interfere with NRC regulation of radiation hazards." *Id.* The court added, however, that "to the extent that it is established on remand that an *actual* conflict exists between the Commission's authority and the City's suit, the Commission must, of course, prevail." *Id.* (emphasis in original). Here, as the court of appeals itself concluded, the relief sought by petitioners would interfere with NRC regulation of radiation hazards. Thus, the decision in *Illinois* fully supports the court of appeals' ruling in this case.[9]

4. Finally, we note that the relief sought by petitioners is not foreclosed by the dismissal of their request for injunctive relief. As the courts below pointed out, there are administrative procedures available for challenging the NRC staff's recommendation regarding stabilization

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[9] Petitioners' claim that the decision below conflicts with the court's earlier decision in *Illinois* is further undercut by the fact that Judge Wood, who authored the court's opinion in this case, was a member of the panel that decided *Illinois* and joined in that opinion. Furthermore, none of the Seventh Circuit's active judges requested a vote on the petition for rehearing en banc, in which petitioners asserted that the decision here conflicted with that in *Illinois*. In any event, we note that the existence of an intracircuit conflict is not sufficient to warrant this Court's exercise of its certiorari jurisdiction. *See Wisniewski* v. *United States*, 353 U.S. 901 (1957).

of the wastes at the West Chicago site. Pet. App. A15; App. A, *infra*, 4a. In fact, the State is attempting to convince the ASLB that, "for reasons related to either *radiation* or *nonradiation* hazards, the West Chicago site is unfit for storing the byproduct material." Pet. App. A15. Thus, the safety concerns raised by petitioners and the interest in federal supremacy protected by the preemption doctrine can be accommodated by the presentations to the NRC—the federal agency entrusted with regulatory authority in this area.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 14, 1986

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 6323

DONALD E. BROWN; EDITH R. BROWN; EDWIN E. BROWN; BETTY WOLSFELD; and WEST CHICAGO STATE BANK, as Trustee u/t/a 213, dated September 16, 1969,
Plaintiffs,

v.

KERR-MCGEE CHEMICAL CORPORATION, a Delaware corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

This action involves a forty-three acre site owned by the defendant, Kerr-McGee Chemical Corporation ("Kerr-McGee") which is located in West Chicago, Illinois. That site consists of eight acres containing factory and other buildings, twenty-seven acres used for waste disposal, and eight acres which separate the factory and disposal areas. Since 1956, the site has been licensed by the Nuclear Regulatory Commission ("NRC") and its predecessor, the Atomic Energy Commission, to mill a radioactive element called thorium ore. The defendant, Kerr-McGee, ceased these operations in 1973 and the site is currently in the process of being decommissioned. Decommissioning requires that the facility and site be decontaminated and the wastes collected and stabilized at some location. An amendment to Kerr-McGee's license is required before these decommissioning activities can occur.

Pursuant to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the NRC has prepared draft and final Environmental Impact Statements ("EIS") relative to the decommissioning of the Kerr-McGee site. The final EIS is a 270-page document which examines various alternatives for decommissioning the site and recommends a preferred course of action. Specifically, it recommends that the wastes at Kerr-McGee's West Chicago site be encapsulated and stored on the site for an indeterminate period. That recommendation is currently being challenged in proceedings before the NRC by the State of Illinois and the West Chicago Chamber of Commerce.

The plaintiffs in this action are owners of a piece of property located in West Chicago which is adjacent to the Kerr-McGee site. They have brought this action against Kerr-McGee based on a variety of state law tort theories. Specifically, plaintiffs allege that the Kerr-McGee site is presently in such a state of disrepair that it constitutes a public and private nuisance and that the conditions on the site violate a variety of state statutes and municipal ordinances. Plaintiffs seek a mandatory injunction ordering Kerr-McGee to accomplish removal of the pollutants and other hazardous materials on the site and to transfer them to some other location for storage. Plaintiffs also seek an injunction requiring Kerr-McGee to clean up the site and repair all deteriorating structures. In addition, plaintiffs request compensatory and punitive damages.

Kerr-McGee has now moved to dismiss that portion of plaintiffs' complaint which seeks an injunction requiring Kerr-McGee to remove the wastes from the West Chicago site and dispose of them at some other location. Kerr-McGee contends that the exclusive authority to regulate the possession, production, and disposal of radioactive materials is vested in the NRC by the Atomic Energy Act. Thus, Kerr-McGee argues that disposal of the wastes is not subject to state or local control either

through legislative action or through state common law nuisance doctrine. It contends that because the injunctive relief sought by plaintiffs invades an area within the exclusive control of the NRC, it is preempted by federal law.

The court agrees with defendant that plaintiff's claim for injunctive relief concerning the manner in which the wastes at the Kerr-McGee site are disposed of is barred by the doctrine of federal preemption. It is well established that Congress may, either expressly or impliedly, preempt a state's authority to act in a given area. In general, absent explicit preemptive language, congressional intent to supercede state law may be implied from the existence of a pervasive scheme of federal regulation or where there is an actual conflict between state and federal law. *Pacific Gas & Electric v. State Energy Resources Conservation & Development*, —— U.S. ——, 103 S.Ct. 1713, 1722 (1983). The preemptive effect of federal law has been held to extend to state common law doctrines as well as state legislative or administrative schemes. *See Commonwealth of Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117 (3d Cir. 1983).

At issue in this case is the extent to which the Atomic Energy Act, 42 U.S.C. §§ 2021 *et seq.*, preempts the state common law remedy sought by plaintiffs. In *Illinois v. Kerr-McGee*, 677 F.2d 571 (7th Cir. 1982), the Seventh Circuit recently considered the preemptive effect of the Atomic Energy Act in a similar context. There, the court studied the legislative history of the Act as well as the administrative regulations issued by the NRC and concluded that, although states may regulate non-radiation hazards, the NRC possesses "exclusive authority to regulate radiation hazards associates with materials and activities covered by the Atomic Energy Act." *Id.* at 581. Thus, it held that the Act expressly and impliedly preempts state regulation of the hazards associated with nuclear materials.

In this case, it is clear that the injunctive relief sought by plaintiffs will interfere with the NRC's exclusive authority over the disposal of the radioactive wastes at the Kerr-McGee site. Plaintiffs ask that this court order Kerr-McGee to dispose of the wastes at the West Chicago site at some "safe and distant location." Plaintiffs do not contest that these wastes contain radioactive materials.[1] As discussed above, the NRC is currently in the process of developing a plan for disposal of these wastes in the licensing proceedings before it. The NRC has already conducted studies into the impacts of various disposal plans and has recommended that the wastes be encapsulated and stored at the West Chicago site. Plaintiffs admittedly seek to preclude implementation of this plan. Clearly, an order of this court requiring that the wastes be disposed of at some other location and precluding on-site encapsulation would conflict with the NRC's exclusive authority over the disposal of these radioactive materials. Thus, the court holds that the plaintiffs' claim for this form of injunctive relief is preempted by federal law, which law places this controversy in a forum other than this court.

The court notes that it is significant that there are administrative procedures for challenging the NRC's recommendation regarding the disposal of the wastes at the West Chicago site. The NRC's recommendation of encapsulation and on-site storage is currently being challenged in the licensing proceedings before the NRC by the State of Illinois and the West Chicago Chamber of Commerce. Thus, it is likely that plaintiffs' interests in this regard are already being adequately protected.

The court's decision in this case is consistent with the Supreme Court's most recent decisions regarding the preemptive effect of federal law in the field of nuclear en-

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[1] In this respect, this case differs from *Illinois v. Kerr-McGee*, 677 F.2d 571 (7th Cir. 1982). There, the court found that the injunctive relief sought by plaintiffs did not involve radioactive materials.

ergy. In *Pacific Gas & Electric v. State Energy Resources Conservation & Development*, —— U.S. ——, 103 S.Ct. 1713, 1726 (1983), the Supreme Court held that the federal government maintains complete control of the safety and nuclear aspects of energy generation while the states retain traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, rate making and the like. In essence, *Pacific Gas* establishes that federal preemption in the field of safety regulation is complete. In this case, regulation of the manner in which radioactive wastes are disposed of at the Kerr-McGee site is clearly within the field of safety regulation.

The court rejects the contention that the United States Supreme Court's recent decision in *Silkwood v. Kerr-McGee*, —— U.S. ——, 104 S.Ct. 615 (1984) supports plaintiffs' position that there is no preemption in this case. In *Silkwood*, the Court held that federal law did not preempt the compensatory and punitive damage claims of an individual injured as a result of exposure to radiation at a federally licensed nuclear facility. That case did not deal with preemption in the context of a state law claim for injunctive relief which directly conflicts with the NRC's authority over the regulation of the disposal of nuclear wastes. Defendant here has not challenged plaintiffs' damage claims.

In sum, the court holds that plaintiffs' claim for injunctive relief regarding the disposal of the materials at the Kerr-McGee site is preempted by federal law, which law places the controversy within the jurisdiction of the Nuclear Regulatory Commission. Thus, defendant's motion to dismiss this aspect of plaintiffs' complaint is granted.

ENTER:

/s/ Frank McGarr
United States District Judge

DATED: February 13, 1984

STATUTE INVOLVED

The following provisions of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, as amended by the Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021, are involved in this case:

1. 42 U.S.C. § 2012 provides in pertinent part:

> The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:
>
> * * * *
>
> (c) The processing and utilization of source, by-product, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.
>
> (d) The processing and utilization of source, by-product, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.
>
> * * * *

2. 42 U.S.C. § 2014(e) provides:

> The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

3. 42 U.S.C. § 2021(b) provides:

> Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the

Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State—

(1) byproduct materials as defined in section 2014(e)(1) of this title;

(2) byproduct materials as defined in section 2014(e)(2) of this title;

(3) source materials;

(4) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

4. 42 U.S.C. § 2021(c)(4) provides:

No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

* * * *

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

5. 42 U.S.C. § 2111 provides in pertinent part:

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. * * *

6. 42 U.S.C. § 2113(a) provides:

> Any license issued or renewed after the effective date of this section under section 2092 or section 2111 of this title for any activity which results in the production of any byproduct material, as defined in section 2014(e)(2) of this title, shall contain such terms and conditions as the Commission determines to be necessary to assure that, prior to termination of such license—
>
> (1) the licensee will comply with decontamination, decommissioning, and reclamation standards prescribed by the Commission for sites (A) at which ores were processed primarily for their source material content and (B) at which such byproduct material is deposited, and
>
> (2) ownership of any byproduct material, as defined in section 2014(e)(2) of this title, which resulted from such licensed activity shall be transferred to (A) the United States or (B) in the State in which such activity occurred if such State exercises the option under subsection (b)(1) of this section to acquire land used for the disposal of byproduct material.
>
> Any license which is in effect on the effective date of this section and which is subsequently terminated without renewal shall comply with paragraphs (1) and (2) upon termination.

7. 42 U.S.C. § 2114(a)(1) provides in pertinent part:

> The Commission shall insure that the management of any byproduct material, as defined in section 2014(e)(2) of this title, is carried out in such manner as—
>
> (1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and non-radiological hazards associated with the processing and with the possession and transfer of such material***.